

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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IN RE: DIGITEK PRODUCT : CIVIL ACTION
LIABILITY LITIGATION : NO. 2:08-MD-01968
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October 10, 2008
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INITIAL CONFERENCE

BEFORE THE HONORABLE JOSEPH R. GOODWIN
CHIEF UNITED STATES DISTRICT JUDGE
AND
THE HONORABLE MARY E. STANLEY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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23 Proceedings recorded by mechanical stenography; transcript
24 produced by computer.
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P R O C E E D I N G S

CHIEF JUDGE GOODWIN: Good morning.

THE CLERK: The matter before the Court is *In Re: Digitek Product Liability Litigation*, Civil Action Number 2:08-MD-1968.

CHIEF JUDGE GOODWIN: I think we can draw a fine jury from this group, good-looking jury panel.

I'm Judge Goodwin. To my right is Magistrate Judge Mary Stanley. My courtroom deputy is Robin Clark. My court reporter is Lisa Cook. To my left is Judge Stanley's law clerk, Kate Fife. To my right is my senior law clerk, Angie Volk. I hope during this process that you will find my staff and the staff of the Clerk's Office very friendly.

I think you may have already met her, but I'll just introduce our clerk, Terry Deppner. She looks like she's only 25 years old, but she's been with us longer than that. She is one of the most experienced and capable federal district clerks in the country and recognized as such. You'll find her and her staff very helpful.

If you have any question and get bogged down on anything, call the Clerk's Office or call someone on my staff and we'll do our best to help you. Knowing Ms. Deppner, I assume that she's already offered you the opportunity to go downstairs after the hearing today. And for those of you who are not proficient in CM/ECF electronic

1 case filing, she has tutoring arranged, or can arrange it.

2 Am I right about that?

3 MS. DEPPNER: Yes.

4 CHIEF JUDGE GOODWIN: Or you can arrange it with
5 her at some later time.

6 Well, as I said, I don't know how many years ago when I
7 started the Serzone litigation and looked out upon the
8 lawyers -- I assume most of you by now have gotten the book
9 on me. You've asked people about me. You've got
10 information and impressions, and maybe a misimpression or
11 two.

12 Let me give you my side of it. I graduated from law
13 school in 1970. I was a trial lawyer back when lawyers
14 tried cases. I tried cases for 25 years. I tried dog
15 bites, drunk driving cases, murder, car wrecks, products
16 cases, securities cases, commercial cases and, to my
17 everlasting regret, even a few boundary disputes.

18 I loved most of those years and I loved trying
19 lawsuits. But a little more than 13 years ago, I guess it's
20 14 years ago, I got a weird phone call from Senator Byrd's
21 office. And the young lady who was his state director who's
22 now running for Congress called me and said, "Senator Byrd
23 would like to come over to your office to visit with you."

24 So, he came over. We had a very brief discussion about
25 world affairs, politics, such things. And he looked at me

1 and says, "I want to make you a federal judge." Well, I
2 didn't faint, but it was close. And I only thought about it
3 for about 24 hours. Then, like today, it was not a
4 financially attractive offer. But, on the other hand, it
5 was something that I had always thought about but had, long
6 before that time, put out of my mind.

7 I have never looked back with regret. I have enjoyed
8 every moment of these past 13 years. I'll tell you, quite
9 frankly, at that time I was growing tired of some of the
10 practices that were current in our profession, some of which
11 still exist and some of which are getting worse.

12 I became exasperated with unpredictable schedules and
13 an increasing deficit in common courtesy among the members
14 of my profession, even common decency sometimes. I yearned
15 for the good old days of handshake settlements, agreed-to
16 scheduling, and just plain good humor.

17 I remember with fondness traveling to depositions and
18 drinking until 2:00 in the mornings, smoking at least two
19 packs of cigarettes in depositions where you couldn't see
20 the witness that cigarette smoke was so heavy. I'm sure
21 that all affected my life expectancy, along with the steaks
22 I ate on those trips.

23 But this is not all just nostalgia. I was revolted at
24 that time, and still am, by Rambo lawyering. I didn't want
25 to open another letter from a lawyer with whom I had had a

1 phone conversation the day before who then misrepresented
2 boldly and blatantly what had been said in the phone
3 conversation and sent a copy of the letter to the judge.
4 Little did I know, since I had never been a judge at that
5 time, judges hate that stuff.

6 This is all by way of leading up to the point that I
7 recognize that lawyers have gotten to a point where there is
8 some considerable disagreement and difficulty in getting
9 along one with the other. But that's not going to happen in
10 my little corner of the world. We're going to get along.
11 Everybody's going to be happy.

12 I am -- well, I am, by my own estimation, easy to get
13 along with as a judge. It is not my case. I don't intend
14 to interfere in the development of the case. I don't intend
15 to interfere with how you go about your practice of law
16 except to the extent that I learn you're being mean to each
17 other or discourteous to any other lawyer or to this Court.
18 And then I am not as easy to get along with as I'm
19 purporting to be.

20 I will not tolerate -- and I'm looking at people that I
21 don't need to be giving this lecture to. But I just won't
22 put up with it. If you think -- and you can pass this along
23 to people around here that you think might be trouble. If
24 you think that you have heard of large sanctions for
25 misbehavior, you haven't seen the sanctions I can impose.

1 I recognize that a one-hundred-dollar sanction or a
2 five-hundred-dollar sanction or a thousand-dollar sanction
3 is fairly meaningless to a lot of people, and I intend to
4 have meaningful sanctions if necessary. Now, what I intend,
5 of course, is that we have none. And I don't think we will.

6 I think Mr. Frankovitch who's in the back there can
7 tell you during the *Serzone* MDL we never once had a
8 disagreement among lawyers that in any way bubbled up to my
9 level. And I talked with Judge Stanley and she, likewise,
10 had no such problems. So, that's the model we expect from
11 this bar. And I see a lot of the same faces. So, I hope
12 that's the case.

13 This litigation is only complicated in the sense that
14 there are a large number of cases. It is only difficult to
15 the extent you make it difficult. Judge Stanley is an
16 extremely experienced Magistrate Court Judge.

17 How many years?

18 MAGISTRATE JUDGE STANLEY: Sixteen.

19 CHIEF JUDGE GOODWIN: Sixteen years. And before
20 that, she was an Assistant United States Attorney. She
21 knows how to help you with your discovery. She knows how to
22 stage discovery. And I think you'll find her extremely
23 helpful as we begin this process.

24 Let me go off on a tangent. This happens frequently.
25 I recognize we have a number of suits that have been filed

1 in West Virginia, a number of suits that have been filed in
2 State Court in New Jersey, and the MDL cases that are coming
3 in and keep coming in. And we have a few, very few outlier
4 suits.

5 It is my intention to coordinate and deal with all of
6 the discovery in all of the cases to the extent I am able to
7 be persuasive with the judges in the other courts. I've had
8 pretty good luck with that in the past in some matters. I
9 expect that -- I feel pretty confident about it in terms of
10 the West Virginia cases. I feel really confident about it
11 in the case of West Virginia cases. I don't know who the
12 judge is in New Jersey, but I'll try to be sweet and nice
13 and persuasive. Very few state judges mind it when somebody
14 says, "Judge, I'll take that discovery problem off your
15 hands. I'll help you through that."

16 Now, I understand that issues of class certification
17 cannot be dealt with early in a matter like this,
18 particularly where there are State Court cases and Federal
19 Court cases and different jurisdictions. I know that -- I
20 expect that there will probably be one lawsuit filed in this
21 court at some point that is more of a master complaint, for
22 lack of a better word, and that will be very helpful for
23 management.

24 But, in any event, I'm getting ahead of myself. The
25 bottom line is I'm going to do what I can to help the

1 lawyers on both sides of this case move the case forward
2 without disrupting your lives. It is one of my sincere
3 regrets that I scheduled this hearing today on a Jewish
4 holiday. I didn't know. And I will try to accommodate
5 people that -- the lawyers that called me, I was very
6 regretful and told them they did not have to attend.

7 We will have a website which will keep everybody
8 up-to-date. The process for the selection of the
9 plaintiffs' steering committee is set forth in the order. I
10 ask you to get together and try to make it a representative
11 steering committee. And I will be flexible about the number
12 of people that I put on that steering committee, as flexible
13 as your degree of agreement is.

14 The more you agree, the more likely it is I'm going to
15 follow your guidance. The more you disagree, the more
16 likely it is I'm just going to have to strike out on my own
17 and make this sausage blindfolded. I don't want to do that.
18 I had to do that a little bit with the appointment of
19 liaison counsel because there wasn't complete agreement.

20 We have a few items to talk about today, but I see a
21 number of lawyers here. And to the extent that any of you
22 would like to make some preliminary remarks before we start
23 on a more formal agenda, I'll be glad to hear from any of
24 you who would have something to say.

25 I'm sorry. It is my commitment to you that it will not

1 just be liaison or lead counsel that I think about when I
2 deal with these cases. I'll be thinking about each and
3 every one of you and your clients. That's what this is all
4 about.

5 Yes, sir.

6 MR. BECNEL: May it please the Court, Daniel
7 Becnel from Louisiana. I think one of the cases --

8 CHIEF JUDGE GOODWIN: Yes, sir.

9 MR. BECNEL: I think some of the cases that
10 haven't been addressed yet in any of the pleadings that I've
11 seen so far is some of the cases that will be filed very
12 shortly, and I wanted to make the Court aware of those.

13 When people got a recall notice, the first step you had
14 to do was go to your physician to get a substitute
15 medication for the one in the recall notice.

16 In addition to that, you had to incur costs from the
17 physician who would then take blood tests sometimes and do
18 stress tests and so on and so forth to give you a medicated
19 dose of another medication to do the same thing that Digitek
20 did, a digitalis type product.

21 So, you're going to have either a state-by-state class
22 action based on 50 state laws to deal with those issues not
23 only on third party cases, but for individuals who may not
24 have met -- let's say I have a great plan, but I haven't
25 been sick at all this year or I didn't meet my,

1 quote/unquote, deductible. Then it's coming out of my
2 pocket.

3 So, those are class actions I believe that the Court
4 should be aware are coming. Some states allow them. Some
5 states don't. And this is not medical monitoring because I
6 believe all of us agree this is not truly a medical
7 monitoring case after a few weeks.

8 So, I wanted to make the Court aware that that's a big,
9 big issue. And in dealing with the State Court judges, you
10 know, I think maybe some of those cases will be placed in
11 those.

12 And in many instances, what I have seen work is that
13 the state judges and the federal judges, as Mr. Climaco and
14 others have, as we did in the Serzone case and the welding
15 rod case, they hold joint hearings between the state judges
16 and the federal judges doing things such as a science day
17 where you kind of learn the defendant's side of the case and
18 the plaintiff's side of the case and what it's all about.

19 And I think something that Judge Pointer did for us
20 years ago -- he recently died, just tragic. But Judge
21 Pointer would go around because sometimes -- and some of the
22 judges -- Judge Katz recently did it. He actually went to
23 New Jersey and sat, and that is a good thing.

24 And, you know, I'm married to a state judge and every
25 night I have to say, "Your Honor, may I approach the bed?"

1 And I'm just kind of getting tired of that. But problems
2 between state judges and federal judges exist where they
3 don't need to exist. And, so, I would suggest some of those
4 things that Pointer did long ago and he would actually go
5 around the country.

6 Judge Davis did the same thing in *Baycol*. He left
7 Minnesota and went to New Orleans and invited Judge Fallon
8 and some of the other judges to participate. And I can
9 assure the Court that those are the types of things that
10 make these big mass cases work and get them overwith
11 quickly.

12 Thank you, sir.

13 CHIEF JUDGE GOODWIN: Thank you, Mr. Becnel. I
14 appreciate that, particularly the suggestions you had at the
15 end. Your experience in these kind of matters is well-known
16 and I very much appreciate it. I promise you I'll do my
17 best to adopt some of those practices, particularly in
18 dealing with state judges.

19 I've often been accused of believing that I still have
20 to run for this job. So, it's my inclination to reach out
21 to my colleagues in State Court. And your ideas are good
22 and I will do that. That's my plan.

23 How is my friend Judge Fallon?

24 MR. BECNEL: Judge Fallon is wonderful. He had,
25 as you said, a very -- I flew here from Germany 27 hours to

1 get here and left yesterday. But he wrote a 53-page opinion
2 that I read while I was in Europe on attorney's fees where
3 there were disagreements between the attorney's fees in a
4 330-million-dollar case. And I've served with Judge Fallon
5 on probably five or six major cases over the years prior to
6 this.

7 CHIEF JUDGE GOODWIN: Is Vioxx still going on?

8 MR. BECNEL: Pardon?

9 CHIEF JUDGE GOODWIN: Is the Vioxx still going on?

10 MR. BECNEL: It's settled, but I will say this
11 since you brought it up. He did something that Judge Katz
12 did. You know, a lot of federal judges shove things off to
13 the magistrate in terms of settlement so they don't pollute
14 their minds. He --

15 CHIEF JUDGE GOODWIN: That's not a risk,
16 Mr. Becnel. I'm polluted.

17 MR. BECNEL: Okay. He actually got involved for a
18 year and half without anybody knowing it in negotiations
19 with a team that he appointed, as well as the state judges
20 from around the country. And then when they jelled the
21 settlement, they all met together, worked together,
22 appointed their own special masters for their states, et
23 cetera. It worked beautifully.

24 And a lot of people have already got their checks,
25 which is unheard of in an MDL. I mean, I've been in MDLs

1 that have lasted 10, 15 years. In breast implants we're
2 still dealing with some of the ramifications.

3 CHIEF JUDGE GOODWIN: Well, there's a very good
4 reason for that. The MDL conference each year where we get
5 together and discuss matters is held at the Breakers in Palm
6 Beach. And if you don't have an MDL, you don't get to go.
7 So, I think that's why they last that long.

8 MR. BECNEL: I think that's why so many judges --
9 I seem to be one of the heroes of the MDLs because I start
10 so many of them. And many judges say, "What's wrong? You
11 mad at me?"

12 But, Judge, I think that's another thing you ought to
13 be thinking about. In *Serzone* you didn't have to deal with
14 that, but a process whereby if there is a recovery, how do
15 we deal with it on the front end? And I've seen it go sour
16 more in the last five years than in my first 35 years of
17 practicing law and trying cases.

18 And I think you ought to establish two things. One, an
19 audit committee right off the bat. And within your
20 committee you appoint a method by which if -- let's say Fred
21 and Danny are attending this hearing today and Mr. Bell.
22 And Mr. Bell has one hour, Fred has two hours, and I have
23 three hours, and we know we were only here for an hour and a
24 half. Then you nip it in the bud rather than what a lot of
25 lawyers tend to do. They tend to triple bill, overbill.

1 And at the end of the case, Mr. Bell who actually put
2 his time down for an hour's worth of expected pay doesn't
3 have to compete with Becnel who's fudged a little bit and
4 put three hours down.

5 So, when you look at it -- and there's a special master
6 who has no clue about what's going on. That way, there's
7 two people that know about it. You know what's being billed
8 every month or every quarter and the audit committee knows.

9 And if Becnel is doing something not so good, that
10 audit committee through Fred -- Fred comes to Danny and he
11 says, "Hey, Danny, you're kind of overbilling." That's
12 critical to what you're trying to do.

13 What you're trying to do is have lawyers do things the
14 way my father did them when he was a lawyer. It was all
15 handshakes. It was all the word is your bond. It was all
16 you didn't need to have 20-page contracts to deal with it.

17 There's an old adage, Judge -- and I've been at this
18 for 40 years and, you know, and usually trying cases at
19 least three to four months a year -- you can shear a sheep
20 every year, but you can't kill him but one time. And if we
21 kill him that one time with you, then that's the end.

22 And when you go to those MDL conferences, you're going
23 to say, "That Becnel guy, he ain't any good. Don't appoint
24 him to anything in the future." And I have killed the
25 sheep. So, good luck to you.

1 CHIEF JUDGE GOODWIN: Thank you, Mr. Becnel.
2 That's good advice and I appreciate you sharing it and I
3 think everybody here learned a little something from that.
4 I certainly take it all very seriously as you'll see as we
5 go down the road. I really do. And I appreciate it.

6 Anybody else have anything they want to say?

7 (No Response)

8 CHIEF JUDGE GOODWIN: Well, as you probably
9 guessed, we're going to have to wait until we have a
10 plaintiffs' steering committee and the choice of lead
11 counsel to decide a lot of things, but we can go through a
12 few things today to the extent that you know. And I'll just
13 address this to liaison counsel and defense counsel. You
14 may seek the help of your colleagues in the back.

15 How many cases do we expect to be transferred? Does
16 anybody have any idea?

17 MR. BECNEL: Judge, I have a couple hundred trial
18 lawyers around the country. There are not that terribly
19 many cases that you can put your finger on and say, "I can,"
20 with all due respect, "try this case," because whenever you
21 get a population with these problems, as we say, they all
22 have warts. So, some of them are good. Some of them are
23 bad.

24 But these MDLs -- Mr. Paul Sizemore with Mr. Girardi's
25 office, they tried one, you know, in Vioxx. There were 40

1 lawyers who participated in mock trials for two days.
2 Shelley Sanford's firm and her former partner who died was
3 the person that started Vioxx.

4 And as a result of that, the problem is in doing what
5 Judge Fallon did and try five or six cases at an average
6 cost --

7 CHIEF JUDGE GOODWIN: Millions?

8 MR. BECNEL: -- of probably three to five million
9 dollars a pop. Now, Paul knew when he tried that case, he
10 needed a team because the defense had 45 lawyers full-time.
11 They almost took over a hotel just working on motion after
12 motion in the middle of trial. And he recruited one of the
13 girls from my office that did a lot of the discovery and so
14 on and so forth. And, so, we had to put a team together.

15 Now, if a case involves -- if it's a
16 six-hundred-thousand-dollar case and you're spending five
17 million dollars and you're trying to make the other side cry
18 uncle or they're trying to make you cry uncle, that's not
19 very wise.

20 Judge Spiegel did something years ago for us in, in
21 Cincinnati. And what he did was he was going to have -- and
22 I think they teach everybody in your judges' schools now
23 sort of a, quote/unquote, mock trial or summary jury trial
24 where the case was tried. The judge ordered the check
25 writers from the defendants to be there. Plaintiffs were

1 trying to prove and pierce the corporate veil, and we had
2 every kind of thing you can imagine in the case. And then
3 it's not binding. The judge then allowed both sides to
4 debrief the jury. And Ms. Abaray who was with Mr. Chesley's
5 office at the time, we debriefed the jury.

6 CHIEF JUDGE GOODWIN: Where is Mr. Chesley today?

7 MR. BECNEL: I think --

8 Janet, where is he now? I haven't seen him for a
9 while.

10 MS. ABARAY: Janet Abaray. I used to be with
11 Mr. Chesley's firm and he's still in Cincinnati, not doing
12 as much mass work.

13 MR. BECNEL: He's kind of semi-retired from what
14 he told me. He was hoping Hillary would win so he could be
15 Ambassador to Israel. So, that's -- but we debriefed the
16 jury. We both found out what our strengths and weaknesses
17 were. And the next day we settled the case.

18 MR. THOMPSON: Judge, in response to your question
19 of the universe of cases, we have joined together and put up
20 an exhibit list of the filed cases, and I think there are
21 around 80 that are filed.

22 Right now it would be just a wild guess in my mind, but
23 let me make a guess. I think that the universe cases being
24 considered are probably around 2,000, the ones that will
25 eventually make it in the suit; or if there is an agreed

1 tolling agreement, I would expect it to be below that. But
2 that's a wild guess, and I think it's probably on the high
3 side. But that's -- I don't foresee a Vioxx of 40,000 cases
4 coming down the pike. This may be something that other
5 people in the room actually have a better estimate than I
6 do, but that would be my response to your question.

7 CHIEF JUDGE GOODWIN: All right. Let me, let me
8 ask each of you when you stand up, since we're going to have
9 several people talking, to identify yourselves for the
10 record since Ms. Cook, who is the best court reporter in
11 America, doesn't know any of you yet, but she will.

12 MR. THOMPSON: Yes, Your Honor. It's Fred
13 Thompson, Motley Rice, plaintiffs' co-liaison counsel.

14 CHIEF JUDGE GOODWIN: I know West Virginia has not
15 selected a judge yet to handle the consolidated cases. Is
16 that correct?

17 MR. THOMPSON: Yes, sir.

18 CHIEF JUDGE GOODWIN: Does anybody know who the
19 judges are in New Jersey and how many cases they have?

20 MR. THOMPSON: Judge, my understanding is that
21 they are also seeking a consolidation, but the judge has not
22 been selected. I talked with a gentleman yesterday who's
23 more familiar with the New Jersey consolidation. I believe
24 there are 16 cases filed in Atlantic County which, of
25 course, is Judge Higbee's home county and she is a mass

1 consolidation judge and --

2 CHIEF JUDGE GOODWIN: Who chooses them in New
3 Jersey? The Supreme Court?

4 MR. THOMPSON: I believe that it's a panel of
5 judges under the supervision of the Supreme Court. I'm not
6 an authority on that, but --

7 MR. BECNEL: That's right.

8 MR. THOMPSON: They do not have a consolidation
9 judge as we sit here today.

10 CHIEF JUDGE GOODWIN: Based on what Mr. Becnel
11 said, it -- and from your statements that both sides
12 submitted, it's unclear to me how the cases actually break
13 down at this point with regard to theory. It would not be
14 disrespectful, I don't think, to say that in some cases the
15 theories are still developing. Is that fair?

16 MR. THOMPSON: Yes, sir, Your Honor. We're
17 painting a beautiful painting over here, but it's not yet
18 complete.

19 CHIEF JUDGE GOODWIN: Can we reach any kind of
20 agreement on acceptance of service of process, counsel?

21 MR. MORIARTY: Your Honor, my name is Matt
22 Moriarty from the law firm of Tucker, Ellis & West.

23 We have had limited discussions about that topic with
24 the plaintiffs' counsel. We are willing to entertain some
25 acceptance of service of process. But we have submitted a

1 letter to liaison counsel that lists for them the defendants
2 who have been sued around the country, which ones really are
3 involved in the manufacture or the distribution of Digitek,
4 and which ones really don't belong in the cases.

5 So, we would be accepting potentially service of
6 process for the, for the core entities that are involved.

7 CHIEF JUDGE GOODWIN: Could you-all go ahead and
8 meet while we're waiting on this plaintiffs' steering
9 committee and work with liaison counsel to see if you can
10 work out a protocol for that?

11 MR. MORIARTY: We would be happy to do that, Your
12 Honor.

13 CHIEF JUDGE GOODWIN: Thank you, sir.

14 And I would say the same thing about a tolling
15 agreement. That might actually have to wait. I don't know
16 whether or not that can be achieved.

17 The defendants mentioned the status of preservation
18 efforts and suggested the consideration of lifting
19 restrictions on preservation. At this time, it's my
20 intention to keep Pre-Trial Order Number 1 in place. As we
21 go down the road, I'll certainly listen to suggestions.

22 Judge Stanley will talk with all of you after I finish
23 about her view of discovery and generally her approach to
24 discovery and her beginning ideas on this case. And she
25 will be interested, no doubt, to hear what your ideas are.

1 Let me say again that my mind is open on the
2 composition of the plaintiffs' steering committee; that is,
3 in terms of numbers. What I'm looking for is a working
4 plaintiffs' steering committee that will stay engaged, that
5 will devote the time necessary to meet and confer with lead
6 counsel, will engage in regular conference calls with lead
7 counsel and, where requested, will carry out all the hard
8 work tasks that are a part and parcel of such a job.

9 Some of you or some of your friends now that think they
10 want to be on the plaintiffs' steering committee may never
11 have been on one before. So, think about it and talk to
12 people like Mr. Becnel who know what's involved before you
13 throw your name in the hat.

14 There's even some times they ask for money. It looks
15 to me like I have just one firm for the defendants. Is that
16 correct? Is that likely to remain?

17 MS. BETTS: Well, two law firms obviously, Your
18 Honor, but we represent all of the defendants.

19 CHIEF JUDGE GOODWIN: All right. I think I'll
20 leave the rest of it for discussion after we have a
21 plaintiffs' steering committee and the selection of lead
22 counsel.

23 Do you have any questions for me? This is about your
24 only chance to interrogate me. Again, I'll do what Judge
25 Maxwell, who is now about 85 and a judge in the Northern

1 District of West Virginia, told me is his one piece of
2 advice when I went on the district bench. He said, "Resist
3 the impulse to cackle on the nest." So, I'm not going to
4 resist the impulse. I'm going to cackle on the nest for a
5 minute or two.

6 Judge M. Blane Michael who's on the Fourth Circuit
7 Court of Appeals had been on for about three months. He
8 went to Richmond to hear argument. Now I've dropped the
9 name of the Harvard law professor, the liberal.

10 MAGISTRATE JUDGE STANLEY: Charles Tribe.

11 CHIEF JUDGE GOODWIN: Mr. Tribe was making oral
12 argument and Judge Michael spoke up and asked him a
13 question. And Laurence Tribe looked back and said, "Well,
14 Judge, let me ask you a question." And Judge Michael said,
15 "Professor Tribe, I gave that up three months ago."

16 So, do you have any questions? Any questions about the
17 process? Don't leave here thinking that there's something
18 you think I should have covered that I didn't cover,
19 something you're wondering about. Just ask me.

20 MS. BETTS: Your Honor, since we're here, do you
21 have any idea when you'll schedule the next conference
22 because there are some substantive matters, obviously, we're
23 anxious to get moving on?

24 CHIEF JUDGE GOODWIN: I will be guided by your
25 suggestions. If you meet with liaison counsel and make a

1 suggestion or two, I'll follow your suggestion if I possibly
2 can.

3 MR. BECNEL: Judge, --

4 MR. THOMPSON: Judge, the only thing that I would
5 like to urge the Court -- and I have not appeared before you
6 before. But to the extent that telephonic participation in
7 hearings is permitted, the, the air transit system is
8 expensive and I have a terrible feeling that it's about to
9 get a lot more expensive and difficult. And any
10 opportunities that we have to have routine matters heard by
11 some electronic means would be very welcome I do believe.

12 CHIEF JUDGE GOODWIN: I recognize the necessity of
13 doing that. I will be frank to tell you I don't like it. I
14 have a lot less -- I feel like I have a lot less control
15 when I'm dealing with lawyers sitting with their feet up on
16 their desk in their own office smoking a cigar than I do
17 when they're sitting in my conference room.

18 That being said, I know that I'll have to do it and I
19 will do it as an accommodation. I also have now a good
20 video conferencing system available and I like that much
21 better than telephones. So, it's just the kind of thing
22 we'll have to work out as we go along.

23 Charleston, West Virginia, is not the easiest place to
24 get to, but with the TSA there is no easy place to get to
25 anymore. It's just a horrible hassle to fly. I will -- and

1 this is part of working together. I will try my best to
2 accommodate you. But the people that want to be lead
3 counsel who are on the steering committee and want to
4 attend, those people should be willing to come to
5 Charleston.

6 Mr. Becnel.

7 MR. BECNEL: Judge, one of the things -- and I
8 call it the Rubin rule if you remember Judge Alvin Rubin.

9 CHIEF JUDGE GOODWIN: No, I don't.

10 MR. BECNEL: He was on the District Court and he
11 was on the U.S. Fifth Circuit Court of Appeals. There's two
12 rules he made that I think to this day most lawyers who ask
13 to be on the plaintiffs' -- a lot of times lawyers ask to be
14 on the plaintiffs' steering committee and you'll see them
15 twice a year, and the rest of the time they send one of
16 their lawyers.

17 The first rule was that you had to commit personally,
18 personally to do this. Now, if you're in trial in another
19 location or something like that, that was, you got a pass.

20 Secondly, you had to pay your assessment on time.
21 Failure to pay your assessment on time suspended your
22 ability to bill because it's unfair. And you brought up the
23 money. We were with the Tucker firm with Judge O'Malley in
24 the welding rod case and it ain't going so good and the
25 assessment was pushing six, seven hundred thousand dollars

1 per individual. If you don't have the financial wherewithal
2 to accept the financial responsibilities that you're going
3 to have to keep until the end until you get rid of it, you
4 ought to be able to put that in writing and throw me or
5 anybody else off if they don't meet those responsibilities.

6 And the last Rubin rule was, and I thought the most
7 important, was when you get ready, you set the trial -- and
8 he always did it and Judge Fallon and I were trained that
9 way -- within a year of the event. And everything else
10 works backwards from that date, and that date does not
11 change.

12 And if you've got -- here's what the tragedy sometimes
13 is. You ought to have three or four backup cases so that if
14 they come to Mr. Bell and say, "Mr. Bell, you are going to
15 trial in December of next year," and they come to him and
16 they don't want to go to trial and they settle his case,
17 then all of a sudden you've got the month set aside for a
18 trial with nothing to try. And it didn't help the prospect
19 of settlement.

20 So that you have got to have a -- if they're not going
21 to trial, then Fred's case is going or Teresa's case is
22 going or Girardi's case is going or whomever. So, it's just
23 one -- it's like a bunch of ducks. You're either going to
24 settle five or six cases, and you prepare every one of them
25 for trial with different trial teams if need be. That way,

1 you get these cases moving.

2 The worst thing that happens to lawyers today is the
3 disappointment of the clients. And we're dealing with an
4 aging population. We see that in case after case after
5 case. You've got 10, 15, 20 percent of the people in these
6 big cases, if they last four to five years, they die. And
7 then you're dealing with heirs and successors and estate
8 planners and Social Security issues, et cetera, et cetera.
9 It makes it very difficult.

10 When you and I started practicing law, you had a single
11 client. Most of these lawyers in here have multiple clients
12 from all over the country with the internet and referrals.
13 You just have to have newsletters out to them and you have
14 to be able to explain -- we start telling them we've got a
15 trial a year from now, and then it settles and their cases
16 are not moving and they're getting sicker.

17 CHIEF JUDGE GOODWIN: Mr. Becnel, I can tell you
18 this. You know a lot of judges, but you've never met a
19 judge that likes to try cases anymore than I do. And if I
20 set a trial date, I'll stack them up enough that I assure
21 you something will go to trial.

22 MR. BECNEL: Well, and it's just good so that we
23 can tell in the newsletter that the committee sends out to
24 everybody that we've got ten cases set for trial and are
25 prepared for the trial. It's highly unlikely that all of

1 them will go to trial on that date, but they're going to
2 trial one after another as Judge Fallon did.

3 You know, even during the hurricane he tried one of the
4 darn cases twice, once in Houston and then once in New
5 Orleans when the electricity got turned back on. And that's
6 what moves cases. Moving cases is not delay.

7 CHIEF JUDGE GOODWIN: Some of the lawyers who
8 practice in front of me can tell you that for unknown
9 reasons, truly unknown reasons, my cases move. I don't know
10 why. I really don't know why, but they do.

11 Any other requests that we need to take up before I
12 leave this matter to Judge Stanley?

13 Yes, sir.

14 MR. MORIARTY: Your Honor, may I just say one
15 thing? I've talked to many of the plaintiffs' lawyers, not
16 just liaison counsel, and they all know how important it is
17 for us to talk about product identification. It's important
18 to inspect the pills. It's important to Actavis and Mylan
19 to get their hands around this problem.

20 And although we don't -- Actavis produced about 1.3
21 billion Digitek tablets from 2005 through the end of 2007.
22 They're anxious to get their arms around this. And although
23 we realize that we're not likely to get a widespread
24 agreement on pill testing or tablet testing at the recall
25 facility, I would encourage the lawyers to consider talking

1 about individual tablet testing for their clients.

2 These cases are about individual plaintiffs who have
3 tablets perhaps still in their possession. It's about
4 individual people who may or may not have been hurt from
5 this product. And it's important for the companies, the FDA
6 and I think all these people. And we had encouraged them to
7 move forward with this even as they're working on their
8 structure so that we can keep this moving and hit the ground
9 running once plaintiffs' lead counsel and their PSC and
10 everything else is actually in place.

11 CHIEF JUDGE GOODWIN: Well, I've spent the most
12 time looking and talking to the plaintiffs. I understand
13 your side of the case as well. I hope you understand that.
14 Your side of the case is more predictable for me. So, I
15 just haven't spent as much time chatting you up. Judge
16 Stanley, I think, may have a thought or two about that when
17 she talks to you about that.

18 Yes, ma'am.

19 MS. ABARAY: Thank you, Your Honor. Janet Abaray
20 from the --

21 CHIEF JUDGE GOODWIN: Say your last name again.

22 MS. ABARAY: Janet Abaray from the Burg Simpson
23 firm of Cincinnati. And I just wanted to follow up on
24 Mr. Moriarty's point.

25 We had an opportunity to speak about this and I think

1 you've spoken to several of the plaintiffs' attorneys about
2 this. I also happened to be on the *Heparin* executive
3 committee. And Ms. Kranz is here from the Zoll law firm,
4 and their firm is the lead counsel in *Heparin*. It has a lot
5 of the same issues in terms of the manufacturing problems.

6 And one of the things we were able to do in *Heparin* is
7 to have the defendants produce already to the plaintiffs'
8 committee their own test results on the product. And even
9 though we just served our discovery requests last week, we
10 got from the defendants their test results over a month or
11 two ago. And it's really helped us in that case narrow the
12 issues and help the plaintiffs select cases, reject cases.

13 So, it's very valuable information and that might be
14 something to consider that would help expedite rather than
15 trying to shift the burden to the plaintiffs to be running
16 around doing a bunch of tests. It seems to me we should get
17 the defendants' test results first. I just want to make
18 that suggestion.

19 CHIEF JUDGE GOODWIN: Thank you.

20 Anything else before I turn this over to Judge Stanley?

21 Well, I want to -- one of the things Mr. Becnel brought
22 up is --

23 Terry, did you speak to the groups before we began?

24 MS. DEPPNER: No, sir, I did not.

25 CHIEF JUDGE GOODWIN: There are a number of issues

1 of some significance that arise in these kinds of cases in
2 our Clerk's Office and we want to be of service to you.

3 And if you wanted to go over a few of those,
4 Ms. Deppner, that might be helpful.

5 MS. DEPPNER: Thank you, Your Honor.

6 First of all, I've been with the court 32 years. So --
7 but I would like to introduce with me today Rebecca Proctor.
8 And Becky is the lady in our office who will enter log-ins
9 and passwords for you and mail those to you so you can file
10 electronically in our CM/ECF system, and also Rowena
11 Stiltner who is our operations manager.

12 They will be giving these cases high priority and high
13 attention. And as we get the cases that are filed
14 originally in our court, we have established the website in
15 the case of -- the list of cases there and we have assigned
16 a number and it goes up on that list.

17 We ask that you do look at that list because you can
18 sort it by plaintiffs' names or defendants' names or even by
19 the district from which it came. And I have talked with
20 several of you on the telephone and it seems to be helpful
21 when you did access that list.

22 The other thing that we've established is the attorney
23 listing. It's an alphabetical listing with your names on
24 there. We take the information from the documents that are
25 filed in your cases. Firm names change sometimes. Lawyers

1 go to different firms.

2 And, so, you really do need to check this listing or
3 have your staff check this listing, and it should address a
4 lot of the questions that you may have. We tried to learn
5 from our mistakes in the *Serzone* case on trying to keep
6 counsel straight. It was very difficult because in those
7 days, we were operating off paper and now it's electronic.
8 But we are associating the cases in which your name actually
9 appears on those pleadings.

10 So, if you have a question as to whether we have you
11 represented, it should be on this list of cases that appears
12 on the website. So, we would ask that you check that for
13 accuracy and, if not, inform Becky Proctor, Rowena, or even
14 myself. If you encounter any problem, we're pretty
15 accessible and we'll try to get back to you as soon as
16 possible. And if you have anything that you want the
17 Clerk's Office to do, please don't hesitate to give me a
18 call.

19 CHIEF JUDGE GOODWIN: I remember one thing that
20 you or Becky or somebody mentioned to me is there is the
21 problem that Mr. Becnel identified. Sometimes your parties
22 die and we need to know. We need substitution of parties in
23 accordance with the rules in a timely fashion. We need to
24 know who are the plaintiffs in the cases and who are the
25 lawyers. So, if you would make sure to try to keep -- on a

1 regular basis keep your case styles up-to-date.

2 MS. DEPPNER: We've also posted a couple of forms
3 on our website to try to help you or assist you if we need
4 to notify you about change of counsel. They're PDF forms
5 and that should assist the process. But if there's
6 something else that we can develop for you and it's within
7 reason that we can do, we'll be glad to do it if you just
8 give us a call. Thank you.

9 CHIEF JUDGE GOODWIN: Anything else?

10 Yes, sir. Mr. Becnel.

11 MR. BECNEL: Judge, bringing up what the clerk
12 said, many judges do it differently and Clerk's Offices do
13 it differently. In New Orleans it was a nightmare when you
14 had 250,000 people filing lawsuits and insurance suits and
15 FEMA trailer suits and what have you. Some people file in
16 their jurisdiction 20 cases.

17 Let's say I have 20 cases in Louisiana. I filed 20
18 cases in one lawsuit. And then it gets over here. Some
19 judges, like Judge Bechtel with Fen-Phen, then ask you to
20 break them down; or if you have a tolling agreement, then
21 you've basically broke them down already.

22 And what I would suggest is there's two ways to do it.
23 And Fred said he didn't think there would be a ton of cases
24 here, but you just don't know. There's four states --
25 you're going to find out real quick the four places that

1 have one-year statutes. But what's important is how the
2 Clerk's Office handles those.

3 And Judge Fallon kind of addressed it with Vioxx. When
4 we have -- let's say Danny's filed 200 cases under one
5 number and I've found out that some of them don't meet the
6 requirements to be a viable case. And how do you dismiss
7 them when I've got 200 filed in one lawsuit?

8 CHIEF JUDGE GOODWIN: Like each suit files under a
9 --

10 MR. BECNEL: Pardon?

11 CHIEF JUDGE GOODWIN: Each suit files -- pays a
12 filing fee. Each suit pays a filing fee. Each suit has an
13 individual number.

14 MR. BECNEL: That's right. I just wanted to make
15 sure because a lot of times what you'll have is people --
16 you won't get it for six months, but they'll be filed.

17 So, what you call that is de-bundling as Judge Bechtle
18 did. You de-bundle the cases. And in some cases, what they
19 did in New Orleans was, because of the Clerk's Office about
20 to collapse, is you took that one case that came to you and
21 then you de-bundled them and each one got a different
22 number.

23 And in some cases, there -- because so many of the
24 people were so poor and they lost everything, they couldn't
25 even file, pay a filing fee. They let them be de-bundled

1 with a number. But unless the lawyer's willing to put up
2 \$350, those people couldn't pay. And that was what the
3 judges were dealing with, you know, how do we make people
4 pay \$350 when they've lost their house, they've lost their
5 business, they've lost their job, and they're living in some
6 other state.

7 CHIEF JUDGE GOODWIN: We may have a depression in
8 West Virginia, but we're not going to have a flood like
9 that.

10 MR. BECNEL: Okay.

11 CHIEF JUDGE GOODWIN: We're too high up.

12 I want to thank all of you who came considerable
13 distances to attend this preliminary meeting. I know there
14 are several lawyers who have cases who are not here and I
15 understand the reasons.

16 Let me just -- besides all my good wishes and my great
17 affection for all of you, let me leave you with just a
18 couple cautionary notes.

19 Court orders are the law. I expect court orders to be
20 followed. Hearings set for 9:00 start at 9:00. Hearings
21 set for 10:00 start at 10:00. I will always commit to you
22 that I will be on time, and I expect lawyers to be on time.

23 I will do my best, consistent with getting the rest of
24 my work out like you do, to give you prompt responses as we
25 go down the road. I will work with you as hard as I can.

1 Again, if you have any troubles procedurally with any
2 issue, the first place to check is with the Clerk's Office.
3 Becky, Rowena, Terry, ask, ask for any of them. Write their
4 names down. Ask for any of those people. They will be able
5 to help you.

6 I look forward to working with each of you. I hope
7 many of you, the ones on the steering committee and the ones
8 that are not, still stay in touch through the website. If
9 there's information that does not appear on the website that
10 you're concerned about, call lead counsel or liaison counsel
11 and they'll let us know.

12 We'll try to keep up-to-date and try to stay, try to
13 keep you in a position that you can make your clients happy,
14 that you can keep your clients advised that they feel like
15 you're doing your job for them. I'm very cognizant of your
16 responsibilities and I'll try to help you as much as I can.

17 It's nice to see all of you, those that I know and
18 those that I'm seeing for the first time. I look forward to
19 seeing many of you in the future. And of those cases from
20 West Virginia, if, God forbid, it gets to that point from
21 some people's perspective, I will truly enjoy trying the
22 cases. I'll leave this to Judge Stanley.

23 (Whereupon, Chief Judge Goodwin retired from the
24 courtroom, after which the following occurred:)

25 MAGISTRATE JUDGE STANLEY: Please be seated.

1 I appreciate you coming today and I would like to give
2 you a brief overview of how I approach complex cases and
3 what my expectations are.

4 Some of you have had experience with me in the *Serzone*
5 case or perhaps in the *Superfund* case or the *Keystone Bank*
6 case or cases or whatever, but I have had some experience in
7 handling multitudes of parties and claims, and I have
8 developed a protocol which seems to work for me and I -- but
9 I also want you to understand that if what I think is
10 working does not work for you, you need to talk to me.

11 At one point, I set a deposition schedule and it was
12 too arduous. It was unreasonably arduous and nobody said a
13 word to me and I never knew. And it was only after the fact
14 that I learned what a terrible strain I had placed on the
15 lawyers. So, I expect some feedback.

16 Now, I have learned over the course of the years that
17 practicing lawyers do not know or understand the reality of
18 the folks who are actually working in the courthouse day in
19 and day out. And the most important people in the
20 courthouse after Judge Goodwin are the court reporters and
21 the clerks.

22 And the single most important inanimate object is the
23 clerk's computer because the judges are getting all kinds of
24 reports off the computer and we are looking at the docket
25 sheet on a regular basis. I continually discover that

1 lawyers never look at their docket sheet. They serve
2 everybody in the case with a particular document, but they
3 forget to file it with the clerk, even something as
4 important as an answer.

5 The docket sheet in this particular case, as of the 2nd
6 of October, was 75 pages long, but 68 of it has to do with
7 lawyers and parties. We need to clean this up. There are a
8 whole bunch of parties in there that as far as I can tell
9 have nothing to do with this case, but I don't know that.
10 They're mostly defense, defendants.

11 And from what I have seen from the papers submitted by
12 the parties, it was a kitchen sink approach to naming
13 defendants. And, so, all these various entities got named.
14 It's stuff like that that drives the Clerk's Office crazy
15 because they have these mammoth lists and they can't really
16 tell if these people are actually in the case or not or
17 whether they even exist.

18 So, I am going to back up the clerk completely and her
19 plea that you keep your list current; that is, your name and
20 your address, the lawyers who are actually working on the
21 case. If you have lawyers who are not working on the case
22 but are on this docket sheet, get them off. And ultimately
23 we will be developing lists, e-mail lists of steering
24 committees and others so that you don't have such lengthy
25 docketing or entries on the docket sheets.

1 Now, the court reporter. Every single person who has
2 spoken out loud today should consider it to be their
3 obligation to give a business card to the court reporter.
4 There's no way that she's able to hear the name of the firm
5 and necessarily link it up with the right person on the
6 docket sheet. And when it's 68 pages long, it's a
7 challenge. So, please be sure that whatever, whenever you
8 speak that that court reporter knows who you are.

9 One of the decisions that you-all will need to make is
10 the extent to which you want your meetings with me, which
11 I'll discuss soon, on the record or off the record because a
12 lot of that is going to depend on how they take place. I'll
13 get to that in a minute.

14 Now, for those of you who have never appeared before
15 me, I suggest that you do a little bit of legal research and
16 read some of the opinions that are out there on Westlaw
17 concerning discovery disputes.

18 As a judge, I have learned the extraordinary efforts
19 that judges and lawyers put into amendments to the rules,
20 and I honor their work and I read the Advisory Committee
21 notes and I understand the spirit in which the amendments to
22 the rules have been made.

23 I am real tired of receiving memoranda from lawyers who
24 seem to think that what is, quote, relevant, unquote, is the
25 subject matter of the party's claims and defenses. That

1 language in the rule was changed on December 1, 2000.
2 What's relevant now is the party's claims and defenses, not
3 the entire universe of the subject matter.

4 So, if you read my writing, you're going to see that I
5 apply the rules the very best I can and I work real hard at
6 it. I honor the spirit of the rules. I am extremely crabby
7 when I start seeing boilerplate objections, interrogatory
8 answers which are not verified, assertions of privilege
9 without privilege log and without any explanation.

10 Having said all that, let me now say that typically in
11 a complex case, at least for the first six months, I throw
12 the rules out the window. And, so, you say, "Huh? How does
13 that happen?"

14 And what it is, the procedure that I use is that it is
15 informal discovery. I am firmly of the belief that each
16 party has the right to discover their case to determine the
17 truth as best they possibly can of the matter at issue to
18 represent their client the very best they can in a collegial
19 and cooperative way without ambushes, without
20 misrepresentation, and with a straight ahead approach.

21 The defense should understand that, of course, they're
22 going to have to turn over a whole lot of stuff. And the
23 plaintiff should understand that they're going to have to
24 reveal a whole lot of personal health information. And it's
25 going to be an aggravation and your clients aren't going to

1 want to do it. They'll just want to come to court and talk
2 about their experience.

3 But the defense has the right to their health
4 information, just as the plaintiffs have the right to a lot
5 of information from the defense. And, so, once you get used
6 to that, things will go a lot more smoothly.

7 Now, Judge Goodwin took the opportunity to talk a lot
8 about the role of lawyers in the case and I want you to
9 understand that those lawyers with whom I'm going to be
10 working the most closely, I will honor some of your
11 commitments. I will schedule far in advance. I will not
12 change meetings at the last moment. If you have prepaid
13 vacation tickets with your family, I'm going to insist that
14 you go.

15 I am not going to tolerate people scheduling a surprise
16 deposition on the 24th of December. This is not the most
17 important thing in your life. Your family is the most
18 important thing in your life. And I expect all of us to
19 treat, to be respectful of the obligations that we all have
20 outside the courthouse.

21 Now, the first thing that I'm going to do after we get
22 the steering committee named and lead counsel is that I will
23 be meeting with those folks. My expectation is that we will
24 agree on stage discovery.

25 Now, it's my understanding that the particular facility

1 at issue in Little Falls, New Jersey, is closed. Is that
2 correct?

3 MR. MORIARTY: It's not manufacturing. There are
4 people there working every day, though.

5 MAGISTRATE JUDGE STANLEY: All right. This
6 immediately raises issues about the possibility of
7 spoliation or changes in the plant and preservation.

8 Also, given these economic times, we don't know whether
9 the people will be able to continue to work in the facility
10 or whether it will be essential for them to convert the
11 functions of the facility to a different use, or whether the
12 entire entity may be sold and will lose control over that
13 particular building if it's a building.

14 This leads me to believe that first and foremost the
15 number one item on the agenda is to agree on an inspection
16 protocol at that particular premises. And, so, as you think
17 about this, you should be thinking about when this would
18 take place, who would go, how it will be recorded, whether
19 experts will be there, whether the presence of experts will
20 constitute any kind of identification of that expert
21 necessarily as continuing in the case.

22 But, anyway, if anybody thinks that that's not the
23 first item, I would like to hear it now. But it just
24 strikes me that just because there's litigation does not
25 mean that we have the right to prevent the economic use of a

1 building or the employment of persons who may or may not
2 have anything to do with this lawsuit.

3 Mr. Thompson.

4 MR. THOMPSON: Your Honor, Fred Thompson,
5 plaintiffs' liaison counsel.

6 Certainly we would like the opportunity to have an
7 entry to look, and certainly the details we can put forward.
8 But I would ask that there is an official document that's
9 required for any sort of movement of the drug, the
10 production. It's called a batch record which is a very
11 complete record of the movement from the raw materials
12 through.

13 And I would think that we would really want the
14 opportunity to have that document in our possession prior to
15 and at the time of the entry because that will be so much
16 benefit to our, to our understanding and our experts'
17 understanding of what we were actually physically seeing.
18 So --

19 MAGISTRATE JUDGE STANLEY: Is it a flood chart of
20 materials going through the plant?

21 MR. THOMPSON: My understanding -- and I have not
22 seen one, but my understanding is that the batch record is
23 actually a very voluminous record of the raw materials with
24 check-offs and quality assurance as it goes through from the
25 initial raw material through fabrication, and then on

1 through and it follows the finished drug.

2 So, it's not a single page. It's actually a lengthy
3 document. But it is a discrete document. It's not anything
4 anybody has to go and assemble. It's maintained under a
5 legal obligation to maintain it is my understanding.

6 So, that's the long answer to a short question. That
7 is, it would be helpful to have that documentary production
8 prior to the entry. And it seems to me as though we could
9 get that real quickly.

10 MAGISTRATE JUDGE STANLEY: Let me just say that
11 this is a very good example of what I expect. In other
12 words, as you were thinking about what you need in order to
13 discover the case, I expect plaintiffs and defendants to say
14 out loud what they're thinking about because, obviously,
15 we're not going to be able to set this up immediately.

16 And, so, therefore, I would expect plaintiffs to be
17 talking with the defense about your request for a batch
18 record and for them to be consulting with you as to what
19 they're willing to produce or what they're not. And I have
20 no idea what other documents may or may not be relevant
21 which would inform an inspection of the facility.

22 For example, the first thing I can think of is a floor
23 plan and somekind of understanding so that when you walk in
24 that front door, you know where the inactive ingredients are
25 delivered and where things are fabricated or whatever.

1 Anyway, I expect you-all -- that would be, I guess, the
2 various steering committees and others to discuss and to use
3 your collective information and judgment in developing the
4 protocol.

5 And I am going to insist that you work extensively with
6 each other on developing the protocol. And when there's a
7 problem, I will then be notified. If you absolutely cannot
8 work it out among yourselves, then you will bring that
9 problem to me and you'll bring it to me by way of a letter.
10 And the letter will, of course, be copied to the other side
11 and there will be very short turnaround periods. You
12 know --

13 Hold on, Mr. Becnel.

14 It's going to be -- so, for example, if our first
15 meeting has an agenda item of reaching consensus on a
16 protocol for an inspection, then I will be expecting the
17 parties to be working diligently on developing that
18 protocol, coming up with all of those elements which the
19 parties agree upon, and have very specific items as to which
20 you believe you have very good reasons as to why you can't
21 agree because, you know, the stone wall is not going to
22 work. The defense knows that.

23 And the request for absolutely everything in the world
24 isn't going to work on the plaintiffs. And you know that.
25 Don't waste my time. Don't waste each other's time. Have

1 good reasons for why you want things. And we will work on
2 them.

3 My commitment to you is that this case is always going
4 to be one of the top things on my desk, and I am going to
5 hit every meeting with you and I'm going to be ruling pretty
6 quickly.

7 If it turns out that we can't reach consensus on
8 something or we actually need briefing, you'll get an order
9 to that effect and there will be a briefing schedule. My
10 guess is there will be a few times that I will give you as
11 much as two weeks. That's more going to be in the
12 neighborhood of a couple of days because this case is going
13 to keep rolling and the decisions are going to be made
14 promptly.

15 Now, generally speaking, in these cases, at this
16 particular time I think an inspection is a likely first
17 step. I also understand there is a recall facility.

18 Can you give me an idea of what that entity is? You
19 mentioned it, Mr. Moriarty.

20 MR. MORIARTY: Yes, Your Honor. There's a company
21 called Stericycle that specializes in pharmaceutical
22 recalls. So, in the early stages of this before April 25th
23 when Actavis was working out the recall plan with the FDA,
24 it was agreed that Stericycle would actually manage the nuts
25 and bolts of the recall so that pharmacies, hospitals,

1 consumers, everyone who had Digitek in their possession had
2 a contact number right away where they could return the
3 Digitek, get a refund, and it is all stored.

4 I haven't personally been there, but I verified
5 material is stored in the shipping container in which they
6 received it in some manner so that they can find it. And as
7 of the end of September, there were roughly 30 million
8 tablets at Stericycle.

9 MAGISTRATE JUDGE STANLEY: Do you want anybody
10 who's a plaintiff here to submit any Digitek that they have
11 to that facility?

12 MR. MORIARTY: Well, Your Honor, we've done a
13 couple things and pushed this point again and again. We
14 don't want to put the cart before the horse. Actavis and
15 Mylan do not believe that double thick tablets or
16 non-conforming tablets left the manufacturing facilities or
17 the distribution facilities. So, we think that the time and
18 money in this case is better spent trying to figure out if
19 there are non-conforming tablets out there.

20 So, we have submitted to liaison counsel three pill
21 test protocols. They involve -- one involves a formal
22 inspection at Stericycle where both sides would agree on a
23 professional science based company who could facilitate this
24 kind of inspection. We've offered to inspect pills that the
25 plaintiffs have ourselves with the equipment that's

1 necessary to do that. And we have offered to them that we
2 can select laboratories around the country and we could
3 jointly submit their individual Digitek tablets to those
4 labs for weighing, measuring, and what's called dose
5 uniformity. We've offered all of those things.

6 We've had almost no takers. We think that that is the,
7 the priority is to find out and to get our arms around
8 whether there actually are non-conforming tablets and that
9 the answer to that question will drive this litigation, not
10 the answer to what's in the batch records, which we're happy
11 to produce, but how many batch records is the question.

12 So, we've offered all those things. The plaintiffs
13 themselves have the choice to either send their Digitek to
14 Stericycle or to keep them themselves. We can't force them
15 to submit them. But I think about a third or a fourth of
16 the tablets at Stericycle are from consumers themselves as
17 opposed to a hospital or a pharmacy.

18 So, some, some claimants have. Other claimants we know
19 did not send their tablets in, but that's really up to them.

20 MAGISTRATE JUDGE STANLEY: So, the answer is, yes,
21 if they want to. Yes, you would like plaintiffs to send
22 their tablets to Stericycle if they want to.

23 MR. MORIARTY: Yes.

24 MAGISTRATE JUDGE STANLEY: All right.

25 MR. MORIARTY: And it's actually the FDA's and the

1 company's idea because if these are out there, they don't
2 want somebody reaching into their medicine cabinet and
3 taking it by accident. So, I would hope that the lawyers
4 here have secured their clients' tablets and put tape around
5 them and, you know, "do not take." But that's what this is
6 all about. That's why it's set up that way in the first
7 place.

8 MAGISTRATE JUDGE STANLEY: Mr. Thompson.

9 MR. THOMPSON: Judge, you're going to find that we
10 don't disagree that there is a need to have testing and to
11 understand that. We -- as we understand it, the active
12 ingredients in these tablets have a half-life and they
13 diminish over time. So, we understand that testing is
14 necessary.

15 We've actually had discussions with regard to what to
16 do with the Stericycle tablets and whether or not we can
17 reach a protocol to have those tablets examined. I do think
18 that has to be put on the -- not the back burner, but that
19 has to be deferred until lead counsel are appointed who has
20 the responsibility under PTO 2 to conduct the active
21 discovery on behalf of the MDL.

22 I do think that the Stericycle -- I would be surprised
23 if anybody is continuing to send things in. If there was a
24 wave of recalls, I think that there's, there's a definite
25 break point, and that is those clients who have those in

1 their possession and now within the possession of the
2 plaintiffs' attorneys.

3 The plaintiffs' attorneys, that remains to be seen as
4 to whether or not it's in the interest to have a joint
5 facility or for the plaintiffs to have a separate but agreed
6 upon objective test facility and to determine that. I
7 really think that that particular issue needs to be deferred
8 until the appointment.

9 But what I do want to, to raise to the Court is that
10 the Stericycle examination is one that I would expect to be
11 agreed upon in a protocol manner. And if we can't agree, I
12 do think that would be within the power of the Court to, to
13 reconcile that for us.

14 As far as the other testing, that needs to -- we
15 recognize the importance of it, but I do think that the
16 details of that need to wait a couple weeks until after
17 Judge Goodwin appoints --

18 MAGISTRATE JUDGE STANLEY: I concur that the
19 actual protocol as to testing is appropriate after the
20 steering committee and the lead counsel have been appointed.
21 However, the fact that we're discussing these topics is
22 important.

23 And let me just mention one topic that was a pretty bad
24 experience that we had in the *Serzone* case. And that is the
25 relationship of some attorneys on the plaintiffs' side with

1 their clients.

2 And all of us are aware that some attorneys are
3 advertising on television concerning Digitek, asking
4 open-ended questions of whether or not a viewer was injured
5 or suffered some adverse effects after taking Digitek.

6 There were similar type advertisements concerning
7 Serzone and some attorneys who recruited, or represented
8 dozens of plaintiffs. However, there was virtually no
9 follow-up by that attorney with those clients. And it
10 became -- addresses changed and we couldn't find the
11 plaintiffs. There was virtually no ability for the case
12 administrator or others to manage claims by these particular
13 plaintiffs because counsel was missing in action.

14 The necessity of counsel staying in contact with the
15 clients, communicating with them about whether or not they
16 have any Digitek, whether the client should give it to their
17 attorney, what they did with it all could be an issue down
18 the road.

19 I just want to put that out there now to state my
20 expectation that counsel will maintain contact with their
21 clients and make sure that they know the importance of
22 either turning in their pills, or perhaps they're already
23 gone, and making notes for future reference as to what their
24 symptoms were or whatever. But we don't need to go into
25 that further at this point. Now, --

1 Yes, Mr. Thompson.

2 MR. THOMPSON: Judge, Fred Thompson. I, I think
3 that the process of negotiating plaintiffs' fact sheets,
4 that -- all of those issues will be addressed in the process
5 of gathering that information. And one of the instances in
6 the fact sheet would be either you have samples, you either
7 have the drug or you have an explanation of how it was
8 discarded.

9 Oftentimes in the case of a death case, you'll find
10 that the pills are actively thrown away, that that's part
11 of -- that's actually very common that the pills are no
12 longer in existence. But that explanation and the, the,
13 where they got them and those types of information, I think
14 we can supply that in a fact sheet context.

15 MAGISTRATE JUDGE STANLEY: All right. Yes.

16 MS. ABARAY: Yes. Excuse me, Your Honor. Janet
17 Abaray from Burg Simpson in Cincinnati.

18 There is one other issue that I should have thought of
19 earlier and I'm sorry I didn't bring it up before when Judge
20 Goodwin was here.

21 One of our clients -- actually, more than one of them
22 called and said that they sent their pills back after the
23 recall and they went to Stericycle. They've now gotten
24 25-dollar checks, I believe, from Stericycle to compensate
25 them for the recall. And they've called us wanting to know

1 what to do.

2 Obviously, we're concerned there's some attempt here to
3 release claims by sending checks in the mail. And I don't
4 know if this is something that other people have had come
5 up, but I wanted to bring it to the Court's attention
6 because it's a big concern, and especially when there's some
7 class actions pending regarding costs. And, then again, I
8 don't know what's on the back of those checks in terms of
9 release language or how it could affect personal injury
10 claims as well. So, what --

11 MAGISTRATE JUDGE STANLEY: Have you seen any of
12 the checks?

13 MS. ABARAY: Not personally.

14 MAGISTRATE JUDGE STANLEY: Has anybody else?

15 MS. ABARAY: We've spoken on the phone with our
16 clients and we've told them not to cash the checks at this
17 point.

18 MAGISTRATE JUDGE STANLEY: Mr. Moriarty or
19 Ms. Betts, do you know anything about this?

20 MR. MORIARTY: I don't, Your Honor.

21 MAGISTRATE JUDGE STANLEY: All right.

22 MR. MORIARTY: All I know is that they were to get
23 a refund for the unused portion of their Digitek.
24 Stericycle is not a defendant and we're not involved in the
25 day-to-day management.

1 MAGISTRATE JUDGE STANLEY: They certainly don't
2 have any authority to speak for Actavis or Mylan or anyone.
3 If you've got a problem with it, get the check. But it
4 sounds to me like, you know, they can take the \$25 and cash
5 it.

6 MR. THOMPSON: Ms. Abaray actually answered a
7 question that I had settled in my mind, and that is who owns
8 the pills that Stericycle is holding. I just assumed they
9 had bought the pills back and that they now belonged to the
10 agent for Actavis. But it may be that they're simply a
11 fiduciary holding those pills for my clients. I'm going to
12 have to think that through. But I think that we'll be able
13 to work out an appropriate protocol to examine those pills.

14 MAGISTRATE JUDGE STANLEY: Well, I certainly
15 expect that we'll be able to get to them.

16 Mr. Becnel.

17 MR. BECNEL: Your Honor, in terms of the
18 inspection, there's two or three things we need prior to
19 even thinking about it.

20 One, usually these companies have P&ID drawings and you
21 can follow it through the process. You have stamping
22 machine manufacturers. Usually the company itself when
23 they're trying to sell the products have done films that
24 proceed with the process from start to finished product in
25 selling it to the distributors and what have you.

1 If we have those basic P&ID drawings, the manufacturing
2 companies of the various mechanical devices within the plant
3 that mixes it, how long they make it, et cetera, we could be
4 getting in the interim -- while we're waiting for this PSC,
5 we could be going on websites and so on and so forth to see
6 if it's made by a company in Germany, that particular piece
7 of equipment and the P&ID drawings. That is not going to
8 change. It's there and it's completed.

9 One of the interesting things when we've had major
10 recalls in the past like in the *Ford Firestone* case is
11 people did the same thing. You brought in the tires. You
12 didn't know whether they were going to fail. You didn't
13 know what the future was and how you test it.

14 The judge in Indiana who handled that MDL, along with
15 the magistrate who supervised all the testing, there were
16 protocols. Well, we're going to test every 50th tire or
17 we're going to test every 10th tire. And you went through a
18 process like that and you logged them in and you knew what
19 you were dealing with.

20 But Fred brought up an interesting point. In a lot of
21 instances, the people have consumed the pills, some of whom
22 died; or after they died, the families, the first thing you
23 do is get rid of the person's clothing and you get rid of
24 all their, you know -- most of these people had five to six
25 different medications that they're taking. You throw all of

1 that away and, you know, the family just wants closure on
2 the death.

3 So, it's going to be a difficult thing to say, "Well,
4 you've got a death case, Mr. Becnel, but you don't have the
5 pill." You might even have the empty bottle and you've got
6 all of the dates in which the pill was given and you've got
7 the doctor saying, "Yeah, if this happened, this could be
8 it." So, that's one of proof and causation.

9 So, I just wanted to bring those two things up. But
10 those two judges had some excellent protocols with tires,
11 not drugs, but how to do it randomly because we had
12 statisticians that said if we inspected so many tires, this
13 is what we would probably find.

14 Same thing. We would have pharmacologists that say if
15 we - and statisticians - if we inspect this many pills,
16 depending on batches, this is what we would probably find,
17 and get a random selection.

18 MAGISTRATE JUDGE STANLEY: I would expect the
19 attorneys to be discussing these matters after the steering
20 committees are formed. It would not be my expectation that
21 discovery would be ordered of any documents prior to the
22 formation of the steering committees.

23 Let me just say about -- you have reminded me about the
24 fact that we're going to have substitution of parties just
25 by the very nature of the elderly people who may be involved

1 in this case.

2 If a protocol is developed with respect to substitution
3 of parties which would avoid the filing of motions which
4 have to be ruled on, that could be of considerable
5 assistance I would think. If this can just be done through
6 the Clerk's Office without the necessity of a judge's ruling
7 or if it is important to have a judge's ruling on
8 substitution of a party, that you have a simple form that's
9 available on the website. And we would have that available
10 and we would expect all the attorneys to use the form.

11 Now, it will take some monthly meetings in person for
12 us to get to know each other and to develop our
13 understanding of how discovery is going to move along in
14 this case. Generally speaking, of course, there will be
15 some inspection issues, documents back and forth.

16 And then after there has been an examination of
17 documents, that's when witness statements would be -- such
18 as interrogatories or depositions would be appropriate. The
19 plaintiffs' fact sheets will be going on simultaneously with
20 the defense production of documents to the extent it's
21 appropriate. We'll have to work all those things out.

22 It would be my hope that as we develop each other's
23 familiarity with each other's approaches to the case that we
24 would be able to go to video or telephone conference. If we
25 do a telephone conference, it's virtually impossible to get

1 a court reporter with a record. People just talk. It's
2 extremely difficult.

3 So, you always are going to need to decide the extent
4 to which you want a record. If you want a record, it's
5 probably going to have to be at a minimum video and maybe in
6 person.

7 Now, basically there will be monthly meetings. They
8 will be set going out for eight months or so. So that when
9 we have our first meeting with the steering -- after the
10 steering committees and lead counsel are appointed, bring
11 your calendars because that meeting will set the dates.

12 And we also need to be sure that there's a clear
13 understanding of who's going to show up each time, how
14 material from each conference will be distributed to others.

15 I have basically gone through the points that I wanted
16 to mention. Are there some other matters that you would
17 like to bring up?

18 MR. BECNEL: How about the documents, Your
19 Honor -- Daniel Becnel again -- the documents that they had
20 to produce to the FDA already for the investigation? Those
21 shouldn't be -- we can't get them from the FDA. The FDA,
22 under the statute, won't give them to us. But it seems to
23 me that those are relevant if they want to know what is a
24 viable case and what is not a viable case.

25 They have produced their inspection records. They have

1 produced the records that were required and subpoenaed by
2 the FDA. Those are going to come out whether it's now or
3 six months from now. But it seems to me it would limit the
4 number -- you say a lot of people are advertising now for
5 these cases. If we had some indication of what those
6 documents show, you could say, "I'm not going to take this
7 kind of case," or, "I'm going to take this kind of case,"
8 and it might help all parties.

9 MAGISTRATE JUDGE STANLEY: Does it go without
10 saying that all of this is going to be done electronically?

11 MR. MORIARTY: When we transfer documents to the
12 plaintiffs, it will be in electronic format. But things
13 like the batch records that Mr. Thompson mentioned are
14 typically kept in a paper format because that's the nature
15 of having them in the room while a blending process is going
16 on or pill compression process, tablet compression.

17 MAGISTRATE JUDGE STANLEY: But they can be
18 scanned?

19 MR. MORIARTY: Oh, yes. When we turn them over to
20 plaintiffs' lawyers, they are going to be in electronic
21 format.

22 MAGISTRATE JUDGE STANLEY: Well, there are a
23 couple ways to do this, and one is a dedicated website
24 that's password protected. And I would certainly ask you to
25 consider that.

1 Another is -- that strikes me as being the simplest
2 approach. There are other methods like you can use a flash
3 drive with -- you know, presumably everybody could use one
4 of those.

5 MR. BELL: Judge, Harry Bell, co-liaison counsel.

6 I think one of the issues that might come up is making
7 sure that the documents which are scanned, making sure
8 they're in color if there are different color notations. I
9 don't know what's on batch records, but I know we get
10 medical records and different entries are made and different
11 color pens may have some significance.

12 Also to the point that anyone needs to go back and look
13 at records, I think on behalf of plaintiffs, we would want
14 to know if any of those documents were going to be destroyed
15 with the only remaining record being electronic records so
16 that if there is some issue, we have to go back and look at
17 the original, but we can do that at some point.

18 MAGISTRATE JUDGE STANLEY: I would assume that the
19 preservation order would prevent documents from being
20 destroyed.

21 MR. BELL: Just so we all have that understanding.

22 MAGISTRATE JUDGE STANLEY: Mr. Thompson.

23 MR. THOMPSON: Judge, I confess as soon as we
24 start talking about electronic media, it makes me feel very,
25 very old and --

1 MAGISTRATE JUDGE STANLEY: Too bad.

2 MR. THOMPSON: There is an area that there is a
3 substantial amount of IT expertise and negotiation in every
4 mass tort that I've been involved with that it will be up to
5 the plaintiffs' steering committee to select an appropriate
6 format to, to receive these documents in a searchable form,
7 and then a negotiation which we may or may not be able to
8 resolve amicably or we may have to bring it to you to
9 resolve those electronic discovery issues.

10 MAGISTRATE JUDGE STANLEY: And I have such
11 enormous expertise in that.

12 MR. THOMPSON: Well, but you've got a gavel and
13 that's the great, that's the great thing.

14 MAGISTRATE JUDGE STANLEY: Well, let me just let
15 you know that my expectation is that the exchange of
16 information will be electronic -- we're not going to kill
17 several forests for this case -- and that it will be focused
18 toward the expertise of younger people. I myself have
19 difficulty keeping up, but I think it's inappropriate for
20 the level of electronic expertise to be aimed at
21 60-year-olds like me as opposed to 35- and 40-year-olds
22 because you-all can hire those young guys and young women
23 who know how to do all of this.

24 MR. THOMPSON: Yes, Your Honor. That was going to
25 be my final point is it's our full intention to have a

1 state-of-the-art electronic repository that is secure and
2 searchable and useful for our, for our plaintiffs. So --
3 but that is, that's not a small detail. That's something
4 that's going to be the object of a lot of discussions
5 between the two sides.

6 MAGISTRATE JUDGE STANLEY: Right. Sure would be
7 nice if we could also work out authentication of documents
8 as we go along. Don't want to hit that at the end.

9 All right, we've raised all kinds of issues today. All
10 of them, I'm sure, will cause you to think of even more.
11 And I urge you to talk to each other. I am going to require
12 you to talk to each other continually. E-mail back and
13 forth and problem solve and be creative. And I look forward
14 to working with all of you to one extent or another.

15 Is there anything else to be covered today before I
16 adjourn this hearing?

17 (No Response)

18 MR. BELL: Nothing further, Your Honor.

19 MAGISTRATE JUDGE STANLEY: Okay. Assuming that
20 counsel is appointed to the -- non-liaison is appointed
21 slash whatever before the end of October, my guess is the
22 first meeting will definitely take place within a week to
23 ten days of those appointments. So, keep your calendars
24 open if you think that there's a reasonable expectation that
25 you're going to be involved. Okay? Thank you.

1 (Proceedings concluded at 10:45 a.m.)

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6 I, Lisa A. Cook, Official Reporter of the United
7 States District Court for the Southern District of West
8 Virginia, do hereby certify that the foregoing is a true and
9 correct transcript, to the best of my ability, from the
10 record of proceedings in the above-entitled matter.
11
12

13 s\Lisa A. Cook

14 Reporter

March 10, 2011

15 Date
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